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July 25, 2018

Jocelyn G. Boyd, Esquire
Chief Clerk & Administrator
Public Service Commission of South Carolina
101 Executive Center Drive, Suite 100
Columbia, South Carolina 29210

RE: Docket Nos. 2017-207-E, 2017-305-E, 2017-370-E

Response to the Office of Regulatory Staff's Reply Brief in Support of Motion to Admit Deposition Testimony From These and Other Proceedings as Evidence

Dear Ms. Boyd:

Joint Applicants South Carolina Electric & Gas Company ("SCE&G") and Dominion Energy, Inc. ("Dominion Energy," or, collectively with SCE&G, "Joint Applicants"), by and through the undersigned counsel, hereby submit this response to the Reply Brief filed by the Office of Regulatory Staff ("ORS") in support of its Motion to Admit Deposition Testimony From These and Other Proceedings as Evidence (the "Motion"). The Hearing Officer's July 20, 2018 directive in Order No. 2018-96-H, expressly stated that: "The Motion to Admit Deposition Testimony From These and Other Proceedings as Evidence is hereby held in abeyance at this time." (*See* Order No. 2018-96-H at 4.) According, we submit the following briefing regarding that aspect of the motion which we continue to assert should be denied.

ORS's Motion seeks an unprecedented ruling from the Commission. It seeks a ruling that ORS may use ***any*** deposition testimony taken from ***any*** witness in ***any*** proceeding as evidence in this case, regardless of whether that witness is available to testify, and regardless of whether that testimony would be admissible under the South Carolina Rules of Evidence absent such an order. The Commission should refuse ORS's unconstitutional request and deny its Motion outright for at least the following reasons.

First, there is no basis for entering a blanket order that permits ORS to use ***any*** testimony from ***any*** person, taken in ***any*** other proceedings. If ORS wants to seek the admissibility of any ***specific*** witness's prior testimony, it has the right to do so based on the facts and circumstances surrounding that testimony, that witness, and the proceedings in which that testimony was taken. ORS has provided no authority or basis for seeking to circumvent this requirement, nor are Joint Applicants aware of any such authority. In fact, a federal court expressly rejected an identical argument in *Bankers Trust Co. v. Rhoades*, 108 B.R. 423 (S.D.N.Y. Bankr. 198), when the plaintiff sought a blanket order stating that all of the testimony and evidence admitted in a prior trial would be admissible in those proceedings pursuant to Rule 804(b)(1) of the Federal Rules of Evidence:[1]

> This Court finds that it would be inappropriate to make a blanket ruling allowing in all the testimony and evidence without having an opportunity to review the evidence or to hear specific objections to its admissibility.

Id. at 429. Further, courts around the country routinely refuse to issue blanket rulings on the admissibility of former testimony or other evidence before a party specifically identifies the testimony or evidence it seeks to introduce. *See, e.g., Low v. Trump Univ., LLC*, No. 310CV00940GPCWVG, 2016 WL 6732110, at *2 (S.D. Cal. Nov. 15, 2016) ("The Court likewise declines to rule that non-representative student testimony is admissible without limit."); *One Source Envtl., LLC v. M+W Zander, Inc.*, No. 2:12-CV-145, 2015 WL 13505360, at *2 (D. Vt. Dec. 8, 2015) (declining to make a "blanket ruling on the admissibility of [a witness's testimony" because "certain portions of his deposition testimony cited by Plaintiff are undeniably based on hearsay"); *Negrete v. Allianz Life Ins. Co. of N. Am.*, No. CV 05-6838 CAS MANX, 2013 WL 6535164, at *21 (C.D. Cal. Dec. 9, 2013) (declining to issue a blanket ruling on the admissibility of absent class member testimony); *accord United States v. Yurek*, No. 15-CR-394-WJM, 2017 WL 2880123 (D. Colo. July 6, 2017) (denying the defendant's motion "to the extent it seeks a blanket pretrial exclusionary order," stating that "the Court instead DEFERS RULING on the admissibility of any particular 'photographic evidence' until the Court can review and rule on specific photographs in the context of other evidence presented at trial"); *Adams v. Boston Scientific Corp.*, No. 2:12-CV-0932, 2016 WL 2939514, at *2 (S.D.W. Va. May 19, 2016) ("[A]n evidentiary ruling on this matter depends on the specific content introduced and the context in which it is introduced. So the court would be remiss at this time to weigh the overall substantive value against the overall prejudice relating to this evidence in an effort to craft a blanket admissibility ruling. The court will wait to see the content and context before ruling on this matter."); *In re Folding Carton Antitrust Litig.*, 88 F.R.D. 210, 211 (N.D. Ill. 1980) ("We cannot make a blanket ruling on the admissibility of evidence not yet before us.").

[1] South Carolina Rule of Evidence 804(b)(1) is identical to its federal counterpart. *Compare* S.C.R. Evid. 804(b)(1) *with* Fed. R. Evid. 804(b)(1). In such cases, South Carolina courts often look to federal court decisions on evidentiary rules for guidance. *See, e.g., State v. Garcia*, 334 S.C. 71, 75, 512 S.E.2d 507, 509 (1999) (looking to the interpretation of Fed. R. Evid. 803(3) for guidance with applying S.C.R. Evid. 803(3) because the two rules are identical).

Second, entering a blanket order providing ORS with *carte blanche* to admit any deposition testimony from any other proceedings at the hearing in this matter would constitute a gross violation of Joint Applicant's due process rights under the United States Constitution and the South Carolina Constitution. As the South Carolina Supreme Court has expressly recognized:

> Where important decisions turn on questions of fact, due process often requires an opportunity to confront and cross examine adverse witnesses. Confrontation includes the right to be physically present during the presentation of testimony.

S. Carolina Dep't of Soc. Servs. v. Wilson, 352 S.C. 445, 452, 574 S.E.2d 730, 734 (2000) (internal citations omitted). That right to confrontation requires that a party against whom evidence is offered be given "a meaningful opportunity to be heard." *Id*.

Third, what ORS is effectively asking this Commission to do is permit it to build its case on hearsay. *See* S.C.R. Evid. 801(c) (defining "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted"). The Commission's regulations are clear that "[t]he rules of evidence as applied in civil cases in the Court of Common Pleas shall be followed." S.C. Code of Regs. R. 103-846(A). Though the Commission's regulations do allow it to receive "any part of the evidence . . . in written form" where doing so will expedite the hearing, but it does not authorize the Commission to disregard the rules of evidence or the hearsay prohibition by doing so. *Id*. Said differently, the Commission can allow evidence to be received in written form ***as long as it otherwise complies with the South Carolina Rules of Evidence***. ORS's Motion ignores that substantial caveat. Hearsay is not admissible under the South Carolina Rules of Evidence unless it falls into one of the discrete exceptions to the hearsay rule. *See* S.C.R. Evid. 802. Though Rule 804(b)(1) creates a hearsay exception for former testimony in certain cases, this is not such a case. Prior testimony is only admissible when the declarant is unavailable ***and*** when the party against whom the testimony is offered had "opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." S.C.R. Evid. 804(b)(1). ORS has not identified the specific testimony sought to be used, the specific witnesses giving that testimony, or the proceedings in which that testimony was given. Absent that information, the Commission cannot even begin to analyze whether Joint Applicants had an opportunity and similar motive to develop that testimony. As such, ORS has not carried its burden of proving that any of the deposition testimony it seeks to admit meets this standard, and the Commission should deny ORS's Motion outright.

Fourth, the Commission only has the power to authorize the deposition of a witness. Said differently, the Commission cannot authorize the deposition who does not qualify as a "witness" pursuant to the Commission's regulations. Moreover, those regulations are clear that "[w]itnesses ***shall be examined orally***." S.C. Code Regs. R. 103-845(A) (emphasis added). Permitting ORS to base its case on deposition testimony from prior cases deprives Joint Applicants of their right to examine those witnesses orally.

Conclusion: For the reasons set forth herein, and for the reasons set forth in their prior submissions, Joint Applicants respectfully request that the Commission deny ORS's Motion seeking a blanket order holding that all prior testimony is admissible in this matter, regardless of the declarant's availability, and regardless of whether Joint Applicants were adequately provided with an opportunity to confront and cross-examine those declarants.

Respectfully submitted,

/s/ Belton T. Zeigler

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July 25, 2018